No. 8953

United States
Circuit Court of Appeals
For the Ninth Circuit

PHOENIX BLUE DIAMOND EXPRESS, a Corporation,
Appellant,
vs.
DORRIO MENDEZ,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
LORETO LUNA,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
P. N. ESTRADA, Administrator of the Estate of Jesus Valenzuela, Deceased,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
FELIX LUGO, by his Guardian Ad Litem, Estevan Sworez,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
ANDRES ACUNA, by his Guardian Ad Litem, Delores Acuna,
Appellee.

Appellant's Petition for Rehearing

Upon Appeal from the District Court of the United States for the District of Arizona

---

Henderson Stockton
Eli Gorodezky
S. N. Karam
J. W. Cherry, Jr.
Attorneys for Appellant.

No. 8953

United States
Circuit Court of Appeals
For the Ninth Circuit

PHOENIX BLUE DIAMOND EXPRESS, a Corporation,
Appellant,
vs.
DORRIO MENDEZ,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
LORETO LUNA,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
P. N. ESTRADA, Administrator of the Estate of Jesus Valenzuela, Deceased,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
FELIX LUGO, by his Guardian Ad Litem, Estevan Sworez,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS, a corporation,
Appellant,
vs.
ANDRES ACUNA, by his Guardian Ad Litem, Delores Acuna,
Appellee.

Appellant's Petition for Rehearing

Upon Appeal from the District Court of the United States for the District of Arizona

---

Henderson Stockton
Eli Gorodezky
S. N. Karam
J. W. Cherry, Jr.
Attorneys for Appellant.

No. 8953

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Phoenix Blue Diamond Express, a corporation,
Appellant,

vs.

Dorrio Mendez, and
Consolidated Cases,

Appellee.

APPELLANT'S PETITION FOR REHEARING

Comes now Phoenix Blue Diamond Express, a corporation, Appellant in the above styled and numbered consolidated causes, in which, on the 31st day of March, 1939, this Court rendered its decision affirming the judgment of the United States District Court for the District of Arizona in each of said consolidated causes upon the ground that the evidence was sufficient to sustain the verdict and the judgment and that there was no error in refusing to give the requested instruction or in refusing to answer the question of a juror, and files this Petition for Rehearing of said consolidated causes, and hereby briefly and distinctly states the grounds of this Petition for Rehearing as follows:

1. The proof in support of agency was insufficient to support the verdicts and judgments. The Court's statement of the proof made by appellees in support of agency may be conceded to be substan-

tially correct, and in this Petition for Rehearing we accept without argument the Court's statement that "such were the facts brought out by complainants in their attempt to fix on appellant responsibility for the consequences of the collision."

The appellees were required under the law to affirmatively prove agency. Agency may not be establishd by proof of negatives. We urge that all of the facts brought out by appellees in their attempt to fix on appellant responsibility for the consequences of the collision as stated in the opinion by the Court were negative facts. All concede that if Joe Smith was not driving the truck at the time of the collision, there was a total failure of proof. Nowhere in the proofs submitted is there any evidence at all that Joe Smith was driving. The Court, in its opinion, only says that "while the truck was proceeding westerly in the direction of Phoenix with Smith and the load of freight on board," the collision occurred. It is, of course, admitted that Smith was on board but being on board justifies, we urge, no finding or even inference that Smtih was driving. His condition, established by the testimony offered by appellees, only a few minutes before the fatal collision would, we insist, necessitate the finding that he was not driving because he was wholly incapacitated and could not even be aroused.

We have no complaint or disagreement with the Court's understanding and statement of the law.

We are urging a further consideration of the evidence and its application, and we respectfully submit that the necessity for Joe Smith to have been driving at the time of the collision in order that appellant be responsible was overlooked by the Court. Liability could not exist unless he was driving, any more than could liability exist if Smith had arrived in Phoenix on the night of the collision and had afterwards gone to the outlying tavern. We again urge that there is no affirmative evidence that Smith did not first reach Phoenix and then return to the tavern, but, on the contrary, there is evidence that should not be disregarded that he did first reach Phoenix and afterwards return to the tavern; that he did so is supported by the great weight if, as we insist, not by all of the evidence in the case.

2. All of the evidence being negative, the instruction requested and refused was proper. We would, of course, concede if there was affirmative evidence that the impropriety of the requested instruction is apparent.

3. It is basically and fundamentally wrong to commit one juror to the other jurors for his enlightenment upon a question of law. If one juror wanted a proper question of law answered, it is dangerous to assume that other jurors "had doubtless heard and understood the instructions and were able to enlighten their associate." We do not see how the fact that the Court had properly instructed the jurors could obviate the answering of a juror's ques-

tion who had not heard or had not understood the court's instruction. We urge it is a dangerous rule to establish. Surely litigants have the right to have jurors informed as to the law by the Court rather than to hazard a juror who does not understand being properly and adequately advised as to the law by his associates and to hazard the uncertainty as to whether such juror would accept advices from his associates. In such a case a juror ought not to be directed by the court to take up the question of law with the other jurors.

For the reasons stated it is respectfully submitted that a rehearing should be granted.

HENDERSON STOCKTON
ELI GORODEZKY
S. N. KARAM
J. W. CHERRY, JR.
Attorneys for Appellant.

STATE OF ARIZONA, }
County of Maricopa. } ss.

We, HENDERSON STOCKTON, ELI GORODEZKY, S. N. KARAM and J. W. CHERRY, JR., counsel for appellant in the above styled and numbered consolidated causes, do each certify that in his judgment the foregoing Petition for Rehearing is well founded, and do each further certify that it is not interposed for delay.

HENDERSON STOCKTON
ELI GORODEZKY
S. N. KARAM
J. W. CHERRY, JR.

Before me, the undersigned authority, on this day personally appeared Henderson Stockton, Eli Gorodezky, S. N. Karam and J. W. Cherry, Jr., counsel for appellant, who, upon oath, severally say that in his judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

HENDERSON STOCKTON
ELI GORODEZKY
S. N. KARAM
J. W. CHERRY, JR.

Sworn to and subscribed before me this the 27th day of April, 1939.

(Notarial Seal)

F. W. GRIFFEN,
Notary Public

My Comission expires
February 16, 1940.